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NO.

In the Supreme Court of the United States

October Term, 1983

WILFRED H. VANCE,
Cross-Petitioner,

vs.

WHIRLPOOL CORPORATION,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1.

May the 60-day notice period of §626(d) of the Age Discrimination in Employment Act be equitably modified due to the willful, illegal conduct of an employer which prevents the plaintiff from complying with the statutory notice period?

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The Cross-petitioner, Wilfred H. Vance, pursuant to Supreme Court Rule 19.5, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on May 10, 1983, with rehearing denied on October 27, 1983. The petition for certiorari in the case was received by cross-petitioner on January 27, 1984.

OPINIONS BELOW

The initial opinion of the court of appeals (App. A, *infra*, at A1-A14) is reported at 707 F.2d 483. The Supplemental Opinion on Petition for Rehearing of the court of appeals (App. B, *infra*, at A15-A23) is reported at 716 F.2d 1010. The order of the district court ruling that the notice periods of §626 of the Age Discrimination In Employment Act were equitably modified due to the misconduct of Whirlpool is unreported (App. D, *infra*, at A25-A33).

JURISDICTION

The original decision of the court of appeals was entered on May 10, 1983. Plaintiff Vance filed a petition for rehearing and a suggestion for rehearing *en banc* on May 24, 1983. The court of appeals issued a supplemental opinion, modifying its initial decision on August 29, 1983. A petition for rehearing and a suggestion for rehearing *en banc*, was filed by Whirlpool on September 10, 1983. On October 27, 1983, the court of appeals entered an order granting Vance's petition for rehearing only to the extent that the court's supplemental opinion modified its initial decision. In the same order the court of appeals denied the remainder of Vance's petition for rehearing as well as the petition of Whirlpool. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This case arises under the provisions of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (hereafter "ADEA").

STATUTORY PROVISIONS INVOLVED

The provisions of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, which are the subject matter of the question for review, are as follows:

1. Section 7(b) of the ADEA, which provides in pertinent part:

> . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . .

29 U.S.C. §626(b).

2. Section 7(c)(1) of the ADEA, which provides:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Chapter: Provided, that the right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

29 U.S.C. §626(c)(1).

3. Section 7(d) of the ADEA, which provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has

been filed with the Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. §626(d) (1980).

4. Section 7(e) of the ADEA, 29 U.S.C. §626(d), which provides that Section 255 of Title 29 shall apply to ADEA actions. Section 255, entitled "Statute of Limitation," provides in pertinent part:

Any action . . .

(a) if the cause of action accrues on or after May 17, 1947—may be commenced within two years after the cause accrued, and every such action shall be forever barred unless commenced within two years after the cause of action

accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

29 U.S.C. §255(a).

STATEMENT OF THE CASE

On May 3, 1977, Wilfred H. Vance was fired by Whirlpool from his job as territory manager for the Builder Department of the Charlotte Sales Division and replaced by a 34 year old man. Vance was ostensibly fired for violating the Whirlpool conflict of interest policy. In fact, Vance's immediate superior testified that he had been ordered by Whirlpool to "get rid of Vance and get younger blood in the organization."

Whirlpool refused to post a poster in its Charlotte office advising employees of their rights under the ADEA even though it was aware of the existence of the Act and the regulations of the Department of Labor promulgated thereunder. (App. D at A27). In fact, Whirlpool waited more than one year and eight months after the first charge of age discrimination was filed against it in its Charlotte office to post the required ADEA poster. (App. D at A27). This posting occurred more than two years and three months after the plaintiff had been fired by Whirlpool. (App. B. at A2, App. D at A31). Whirlpool did not advise plaintiff of any rights that he had under the ADEA, or even inform him of the existence of the Act. As a result of defendant's illegal conduct, plaintiff was completely unaware of his rights under the ADEA at the time of his discharge in May of 1977. (App. B at A19, App. D at A28). He first became aware of his rights under the Act in April of 1979 when he contacted his present attorneys. (App. D at A28).

By the time Vance obained actual knowledge of his rights under the Act, it was impossible for him both to file his lawsuit within the two year statute of limitations

period for nonwillful violations of the Act and to file a charge with the Secretary of Labor 60 days prior to filing suit. (App. D at A28). Vance, due to the malfeasance of defendant, was forced to choose between satisfying the 60 day notice period of §626(d) or the two year statute of limitations period of 29 U.S.C. §626(e). (App. D at A28). He elected to file his lawsuit within the statute of limitations period, and also to request the Secretary of Labor to attempt conciliation with Whirlpool. (App. D at A28, App. E at A34-35). Accordingly, plaintiff filed his charge on April 30, 1979 and filed his lawsuit on May 1, 1979.

On May 3, the Charlotte Area Director of Labor wrote Whirlpool informing it of Vance's charge and setting forth a conference for May 10, 1979. (App. 222). Defendant failed to attend this initial conference and subsequently informed the Department that it would not engage in any conciliation efforts because plaintiff's claim under the ADEA was barred by the two year statute of limitations period of 29 U.S.C. §626(e). (App. D at A28, App. E at A35). Defendant contended at that time and even throughout the trial of this case, that although Vance was fired on May 3, 1977, the firing "related back" to the day he was suspended, April 22, 1977. (App. D. at A28-29).

Whirlpool had been aware of allegations of age discrimination in its Charlotte office since a charge of age discrimination was filed by Colombo A. Spagnuolo, its Builder Sales Manager in December of 1977. Whirlpool also refused to engage in conciliation concerning that charge. (App. D at A24, A31).

Subsequent to the filing of his complaint, Vance moved the district court to stay the action for 60 days in order to allow defendant to engage in conciliation if it desired to do so. The court ruled that there was no need to stay the action since the case would not be reached for trial for approximately one year, but ordered the parties to engage in conciliation if defendant desired. (App. D at A26).

The matter came on for trial before the district court and a jury on March 27, 1981. Both the court and jury found that Vance filed his charge of age discrimination with the Secretary of Labor within 180 days of obtaining actual knowledge of his rights under the Act. The Court found that Whirlpool's asserted reason for refusing to conciliate (i.e., that Vance's charge and lawsuit were filed outside the two year statute of limitations) was illegitimate, and that Whirlpool, in fact, had no intention of engaging in conciliation. (App. D at A29). The Court also found that defendant suffered no prejudice by plaintiff's inability to give the Secretary of Labor 60 days in which to conciliate the action because defendant was already aware of allegations of age discrimination in its Charlotte office due to a charge of age discrimination filed against it in December of 1977, and because both the Secretary of Labor and the Court afforded defendant a full and fair opportunity to conciliate plaintiff's charge if it really desired to do so. (App. D at A31).

The district court entered an order based upon the jury verdict and upon its own independent findings holding that the 180 day notice period of §626(d) of the Act was equitably tolled until April of 1979. (App. D at A25-33). The court further ruled that Whirlpool was equitably estopped from asserting the 60 day time

period of §626(d) of the Act due to its failure to comply with its statutory duty to make plaintiff aware of his rights under the Act, and that in any event, there was sufficient compliance with the 60 day notice period to accomplish the statutory purpose of that section. (App. D at A32). Accordingly, the district court ruled that it had jurisdiction and proceeded to enter a judgment predicated upon the jury verdict.

The Fourth Circuit court of appeals, in its initial opinion rendered May 10, 1983, held that the 60 day notice period of §626(d) was a jurisdictional prerequisite, and remanded the case to the district court to dismiss the complaint with leave to refile. The court of appeals held, however, that Vance could still comply with the provisions of §626(d) of the ADEA by refiling his charge with the EEOC, waiting 60 days, and then refiling his complaint in the district court.

In its initial opinion the court of appeals failed to determine whether the 180 day notice period of §626(d) of the ADEA was jurisdictional or subject to equitable modification, and this left the parties with the possibility of relitigating the lawsuit and ultimately having the court of appeals determine that the claim was barred on jurisdictional grounds. Accordingly, the court of appeals supplemented its original decision by an opinion dated August 29, 1983, in which it held that the 180 day notice period was not jurisdictional, but rather was subject to equitable tolling. (App. B at A15-23). The court further ruled that Whirlpool's conceded violation of its statutory duty to post a notice in its Charlotte office informing its employees of their rights under the ADEA tolled the 180 day period until such time as Vance obtained actual knowledge of his rights or obtained an attorney. (App. B at A19).

REASONS FOR GRANTING THE WRIT

I.

THE RULING THAT THE 60 DAY NOTICE PERIOD OF §626(d) IS A JURISDICTIONAL PREREQUISITE TO THE MAINTENANCE OF AN ACTION UNDER THE ADEA IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Section 626(d) of the ADEA provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed —
>
> (1) within 180 days after the alleged unlawful occurrence; . . .

In the case at bar the Fourth Circuit held that the 60 day notice period was a jurisdictional prerequisite to the maintenance of an action under the ADEA and not subject to equitable modification. However, the Fourth Circuit ruled that the 180 day notice period, which appears in the same sentence of §626 of the Act, was not a jurisdictional prerequisite, but rather subject to equitable tolling.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court ruled that the statutory notice period for filing a charge under Title VII of the Civil Rights Act is *not* a jurisdictional prerequisite to the filing of a

lawsuit in the district court. While *Zipes* involved the 180 day notice provision of Title VII, the rationale behind this Court's decision mandates a ruling in the case at bar that the 60 day notice period of §626(d) of the ADEA is not jurisdictional. This court in *Zipes* predicated its holding in large part upon the fact that Title VII has a separate statutory provision specifically granting jurisdiction to the district court which makes no exceptions to the grant of jurisdiction. This Court stated:

> The provisions granting district courts jurisdiction under Title VII, 42 U.S.C. §2000e-5(e) and (f) does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts. 455 U.S. at 393-94.

Accordingly, this Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393.

The *Zipes* holding is equally applicable to the ADEA. As this court noted in *Oscar Mayer v. Evans*, 441 U.S. 750, 755 (1979), the ADEA is patterned after Title VII of the Civil Rights Act. Like Title VII, the ADEA has a separate and distinct jurisdictional provision which does not limit jurisdiction to those cases where there has

been compliance by the plaintiff with the separate statutory notice provisions of §626(d). In fact, the jurisdictional provision contains no reference at all to timely filing requirements. In addition, section 626(d), which contains the 60 day and 180 day notice requirements, does not indicate that either time period is jurisdictional, and in fact, does not refer in any manner to jurisdiction. Accordingly, the failure of the Fourth Circuit in the case at bar to follow the reasoning of this Court in *Zipes* requires the granting of a writ of certiorari.

The ruling of the Fourth Circuit is also contrary to the decision of this court in *Oscar Mayer u. Evans*, 441 U.S. 750 (1979). In *Evans*, this court held that compliance with the 60 day waiting period of section 633 of the ADEA, which is virtually identical to the 60 day waiting period of section 626(d), was not a jurisdictional prerequisite to the the maintenance of a lawsuit under the ADEA. Section 633 provides that in a deferral state, "no suit may be brought before the expiration of 60 days after proceedings have been commenced under state law . . ." 29 U.S.C. 633(b). In *Evans* the plaintiff did not file a charge at all with the appropriate state agency.[1] This court held that the plaintiff's failure did not deprive the trial court of jurisdiction, and that the appropriate remedy for failing to comply with the 60 day requirement was for the plaintiff merely to file a

[1]In the present action Vance filed a charge with the Department of Labor prior to filing suit in the district court. However, he was unable to wait 60 days prior to filing his action because the two year statute of limitations would have expired. (App. D at A28, App. E at A34)

charge of age discrimination with the state agency and allow it "an opportunity to entertain [his] grievance . . . Meanwhile, the federal suit should be held in abeyance." 441 U.S. at 765. This Court noted:

> Suspension of proceedings is preferable to dismissal with leave to refile. Respondent's timely complaint has already satisfied the requirements of §626(e). [The statute of limitations provision of ADEA] To require a second filing by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen unassisted by trained lawyers, initiate the process. 441 U.S. at 766.

In the present action, the district court followed precisely the mandate of this Court in *Oscar Mayer v. Evans* by exercising its equitable powers to hold the case in abeyance while providing defendant an opportunity to conciliate.[8] Subsequent to the filing of the complaint in this action, Vance moved the district court to stay the action for 60 days in order to allow defendant to engage in conciliation, notwithstanding defendant's earlier refusal to conciliate. The court ruled that there was no need to enter a formal stay order since the case would not be reached for trial for a period far in excess of 60

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[8]Section 7(b) of the ADEA provides that the district "court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U.S.C. §626(b).

days, but ordered the parties to engage in conciliation if defendant actually desired to do so. (App. D at A26). Whirlpool did not subsequently participate in conciliation conferences with the Department of Labor because, as the district court found, "the defendant, in fact, had no intention of conciliating the charge." (App. D at A29).

The decision of the Fourth Circuit in the case at bar is directly contrary to this Court's admonition in *Evans* that to dismiss the plaintiff's complaint and require the refiling of a second lawsuit after the expiration of the 60 day waiting period "would serve no purpose other than the creation of an additional procedural technicality." 441 U.S. at 766. Under the Fourth Circuit ruling, Vance must forfeit his judgment and undertake what is clearly a useless procedural technicality in spite of the fact that Whirlpool has already been afforded a full opportunity to conciliate plaintiff's charge, both by the Department of Labor and by the district court. (App. D at A31-32)

In *Evans* this court also specifically referred to both the 60 day and the 180 day periods of section 626(d) of the ADEA as "limitations periods" rather than jurisdictional prerequisites. The Court stated, that "the ADEA's *limitations periods* are set forth in explicit terms in 29 U.S.C. §§ 626(d) and (e), not §14(b), 29 U.S.C. §633(b)." 441 U.S. at 762. (emphasis added). The denomination by this Court of the notice provisions of section 626(d) as statute of limitations, as opposed to jurisdictional prerequisites, clearly indicated that the time periods should be subject to equitable modification.

The purpose of the 60 day notice period is to allow the Secretary of Labor an opportunity to conciliate a

charge of age discrimination. In identical language, for both actions brought by the Secretary and for individual actions, the ADEA directs the Secretary to attempt to eliminate the discriminatory practice by "informal methods of conciliation, conference and persuasion." See 29 U.S.C. §§ 626 (b) & (c). However, Congress has specifically stated that the conciliation requirement is not a jurisdictional prerequisite to an action under the Act. The conference report to the 1978 amendments to the ADEA states:

> The conferees wish to make clear that conciliation is not a jurisdictional prerequisite to maintaining a cause of action under the Act. In *Brennan v. Ace Hardware*, 495 F.2d 368 (2nd Cir. 1974), the court reflected a proper understanding of the conciliation requirement in rejecting the employer's argument that the statutory directive is a "condition precedent to the court entertaining jurisdiction of the legal action." In that case the court correctly noted that §7(b) grants the district courts the equitable discretion to stay lawsuits pending before them in order to permit conciliation to be completed before the lawsuit continues. H.R.Rep. 950, 95th Cong., 2d Sess. at 12, *reported in* 1978 U.S. Code Cong. & Admin. News 504, 535.

Although subsequent legislative history is not dispositive, it is entitled to great weight, particularly where the intent of the enacting Congress is obscure. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

Every court of appeals considering the question has determined that the conciliation requirement is not jurisdictional. *See Marshall v. Sun Oil Co.*, 605 F.2d 1331 (5th Cir. 1979); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974). *Accord, Marshall v. B & O Railway Co.*, 461 F.Supp. 362 (D.Md. 1978); *Brennan v. Texas Instruments, Inc.*, 12 E.P.D. ¶10, 983. The Fourth Circuit erroneously attempted to distinguish these decisions by stating that section 7(b) "deals exclusively with the Secretary's enforcement powers under the ADEA." (App. A at A11). In fact, section 7(b) deals with both individual actions and suits brought by the Secretary, and sets forth all of the remedial provisions available in an individual action. *See*, 29 U.S.C. §626(b).

Both the court of appeals and the district court noted that Vance's failure to give the Secretary of Labor 60 days in which to conciliate was caused by the willful, illegal conduct of Whirlpool in failing to make Vance aware of his rights under the ADEA. (App. A at A2-A3, App. D at A31). The district court ruled:

> Plaintiff was forced to take such a course by defendant's own acts and omissions in failing to make Plaintiff aware of his rights under the Act. Defendant's actions are particularly reprehensible because evidence adduced at the trial of this cause demonstrated defendant was aware of the provisions of the Age Discrimination Act at the time of plaintiff's discharge. Defendant's cavalier attitude towards its statutory duty is evidenced by the fact that it did not post an age notice in its Charlotte office until one year and eight months after it first received a charge of age discrimination

by one of its employees, and more than two years and three months after the plaintiff in this action was discharged.

* * * *

This court is unwilling to penalize the plaintiff by dismissing his lawsuit for failure to strictly adhere to the requirements of §626, when such failure was specifically caused by the willful, illegal acts of defendant. (App. D at A31-32).

Accordingly, the district court ruled that Whirlpool was equitably estopped from asserting the 60 day notice period of §626(d), and that in any event, the statutory purpose of the 60 days waiting period had been satisfied since Whirlpool was already aware of allegations of age discrimination in its Charlotte office and it had been afforded a full and fair opportunity to conciliate the charge by both the Department of Labor and the district court. (App. D at A31-33). Such a procedure was approved by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) in upholding the decision that a defendant was equitably estopped from asserting a limitations period. This Court stated:

> To decide this case we need to look no further than the maxim that no man can take advantage of his own wrong. Deeply rooted in our jurisprudence, this principal has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. 359 U.S. at 232-233.

II.

THIS COURT SHOULD DETERMINE IF THE 60-DAY NOTICE PERIOD OF §626(d) OF THE ADEA MAY BE EQUITABLY MODIFIED DUE TO THE ILLEGAL CONDUCT OF WHIRLPOOL WHICH PREVENTED VANCE FROM COMPLYING WITH THE STATUTORY NOTICE PERIOD.

The Fourth Circuit erred by predicating its decision in part on the ground "that other circuits that have considered the question have held that the 60 day period of §626(d) is jurisdictional." (App. A at A12). In fact, every mention of the 60 day notice period in the decisions cited by the Fourth Circuit was purely *dicta*, as that issue was not presented to any of the courts of appeals. None of those decisions involved a plaintiff who actually filed his ADEA lawsuit less than 60 days after filing a charge with the Secretary.

In *Wright v. State of Tennessee*, 628 F.2d 949 (6th Cir. 1980) (en banc) the only question presented to the court was whether the 180-day notice requirement of §626(d) is a jurisdictional prerequisite to the maintenance of a private action under the ADEA. The *Wright* court ruled that the 180-day notice period is not jurisdictional, but is subject to equitable tolling. The other Sixth Circuit decision cited by the Fourth Circuit, *Ewald v. Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183 (6th Cir. 1980), *vacated and remanded* 444 U.S. 914, also did not present the question of the 60 day notice period of §626(d). The *only* issue before that court was whether a deferral state plaintiff, who fails to file with the appropriate state agency within 180 days of the unlawful

occurrence, still has 300 days to file his charge with the Secretary of Labor. *See* 620 F.2d at 1186. The judgment in *Ewald* was vacated by this Court in light of its decision in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), and was subsequently rescinded by the Sixth Circuit upon remand. *See Ewald v. Great Atlantic & Pacific Tea Co.*, 644 F.2d 884 (6th Cir. 1981). In *Reich v. Dow Badische Co.*, 575 F.2d 363 (2nd Cir. 1978), also cited in the opinion below, the *only* questions presented to the court were whether the 180 days notice period of §626(d) and the 60 day notice period of §633(b) [the deferral to state action provision] of the ADEA are jurisdictional. The *Reich* court indicated that both time periods are subject to equitable modification but that the plaintiff had demonstrated no basis for equitable relief.[8] 575 F.2d at 369, 370. In *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976), *reversed on other grounds* 441 U.S. 677 (1978), the circuit court merely affirmed the ruling of the district court that the complaint of a 39 year old plaintiff, not in the protected age bracket, and not an employee of the defendant, failed to state a claim under the ADEA upon which relief could be granted. 559 F.2d at 1075-76.

Only one circuit court of appeals decision, *Rucker v. Great Scott Super Markets*, 528 F.2d 393 (6th Cir. 1976), has actually dealt with the situation where a plaintiff failed to give the Secretary of Labor 60 days notice prior to filing suit. In that case, the plaintiff, for

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[8]There is some language in *Reich* to the effect that the 60 day notice period of §633 is jurisdictional. If that is the holding of the *Reich* court, then it was overruled by this Court in *Oscar Mayer v. Evans*, *supra*.

no apparent reason, filed his lawsuit only two days after filing a charge with the Secretary. On appeal, the Sixth Circuit indicated that the 60-day time period is not jurisdictional, but affirmed the dismissal of the case by the lower court because "the special facts of the case [do not] warrant the granting of equitable relief." 528 F.2d at 395. The concurring opinion in *Rucker* specifically pointed out that the holding of the court of appeals was that "the requirements of §626(d) *are not jurisdictional* in the sense that non-compliance with them deprives the court of the power to entertain a suit." 528 F.2d at 395. (emphasis added)

Since this significant issue has not been squarely addressed by any other circuit court, or by this Court, and since the Fourth Circuit predicated its decision upon an erroneous perception of the holding of other circuits, this Court should grant certiorari to determine whether the 60-day notice period of section 626(d) may be equitably modified due to the willful, illegal conduct of Whirlpool.

CONCLUSION

This Court should grant the cross-petition for a writ of certiorari in order to determine whether the 60-day notice period of section 626(d) of the ADEA is a jurisdictional prerequisite to the maintenance of an action, or is in the nature of a statute of limitations and subject to equitable modification.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 81-1568

WILFRED H. VANCE,

Appellee,

vs.

WHIRLPOOL CORPORATION,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.

JAMES B. MCMILLAN, *District Judge.*

ARGUED: December 9, 1981 DECIDED: May 10, 1983

Before FIELD, *Senior Circuit Judge;* WIDENER and SPROUSE, *Circuit Judges.*

David J. Parsons (Charles J. Griffin, Jr., Seyfarth, Shaw, Fairweather & Geraldson; Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell on brief) for Appellant; Samuel M. Millette, Ernest S. DeLaney, III (Delaney, Millette, DeArmon and McKnight, P.A. on brief) for Appellee.

FIELD, *Senior Circuit Judge*:

This action arises under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (amended 1978) Wilfred H. Vance brought this suit against defendant Whirlpool Corporation (Whirlpool), alleging that Whirlpool terminated his employment in 1977 because of his age.[1] The jury returned a special verdict in favor of Vance. Whirlpool appeals from the judgment for Vance and from the district court's denial of Whirlpool's motion for judgment n.o.v. or in the alternative for a new trial. We vacate the judgment of the district court and dismiss Vance's claim with leave to refile, should Vance be so advised, at the conclusion of conciliation efforts by the Equal Employment Opportunity Commission (EEOC) pursuant to 29 U.S.C. § 626(d).

On May 3, 1977, Vance was discharged from his job with Whirlpool as a territory manager for the Builder Department of the Charlotte Sales Division. At the time of the discharge, Vance was 47 years of age. At trial, Whirlpool asserted that Vance was discharged because of his violation of a well established conflict of interest policy prohibiting the sale or solicitation of orders for non-Whirlpool products by employees while traveling on behalf of Whirlpool. Vance alleged that his discharge was part of a Whirlpool plan to purge its southeast regional sales organization of older employees by replacing them with younger persons.

At the time of the discharge and for over two years thereafter, no notice was posted in Whirlpool's Charlotte sales office setting forth information regarding the rights of employees under the ADEA as required under

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[1] 29 U.S.C. § 623(a)(1) provides:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

29 U.S.C. § 627.[2] Although Vance learned of the ADEA in October of 1978, he asserted that he remained unaware of the possibility that he might have a cause of action under the ADEA until April 1979 when he retained legal counsel.

Vance contended at trial that the delay in learning of his rights under the ADEA rendered it impossible for him to comply with all of the time limitations for filing a charge and a private cause of action, particularly the requirement of § 626(d)(1) that such charges of discrimination be filed within 180 days of the alleged discriminatory discharge. Furthermore, he pointed out that § 626(e) of the ADEA contains a two year statute of limitations on causes of action for nonwillful violations which would have expired in Vance's case on May 2, 1979. Therefore, Vance claimed that it was impossible for him to file a civil suit within the limitations period and still bring a charge with the Secretary of Labor[3] 60 days

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[2] This section provides:

Notice to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

[3] Effective October 1, 1979, all functions vested in the Secretary of Labor pursuant to § 626 of the ADEA were transferred to the EEOC by Section 2 of the Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, *reprinted* in 5 U.S.C.A. app. II, at 159 (Supp. 1982). As the filing in this case occurred prior to the date of transfer of functions, the Secretary of Labor was the correct agency with which to file under the ADEA. For the sake of convenience, throughout this opinion we will refer to the Department of Labor as the agency empowered to enforce the ADEA. The EEOC, of course, is the agency directed to attempt conciliation in this matter pursuant to our ruling. *See Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974).

prior to the commencement of his civil action as required by § 626(d). Faced with this dilemma, Vance decided to file suit and notify the Secretary of Labor of his charge simultaneously.

On May 3, 1979, the Charlotte Area Director of Labor wrote Whirlpool informing it of the charge and setting a conference for May 10, 1979. Whirlpool's attorney subsequently advised the Director that Vance's action in the district court precluded conciliation with the Department of Labor, and no conciliation efforts ensued. Whirlpool filed a motion for summary judgment, contending that Vance had failed to comply with the statutory mandate of the ADEA by not waiting 60 days after bringing a charge before filing suit in federal district court and by not filing his charge with the Department of Labor within 180 days of the allegedly discriminatory act. On May 13, 1980, the district court entered an order denying Whirlpool's motion.

The case was tried before a jury which returned a special verdict in favor of Vance. Based on the jury's verdict and its own findings, the district court entered an order on May 29, 1981, holding that the 180-day filing period of 29 U.S.C. § 626(d)(1) was equitably tolled until April of 1979 when Vance retained an attorney and acquired actual knowledge of his rights under the ADEA. The district court further found that Whirlpool was equitably estopped from asserting the 60-day conciliation period in 29 U.S.C. § 626(d) because of Whirlpool's failure to comply with its statutory duty to make Vance aware of his rights under the ADEA. The district court also determined that in any event, the statutory purpose underlying the 60-day conciliation period had been satisfied since Whirlpool was already aware of allegations of age discrimination in its Charlotte office[4] and since Whirlpool had been afforded a fair

[4] The district court found that Whirlpool was aware of such allegations by virtue of an age discrimination charge filed with the Department of Labor by Vance's

opportunity to conciliate the charge by both the Department of Labor and the district court.[4] Consequently, the district court ruled that it had jurisdiction to hear the action and entered judgment for Vance. Following the denial of its motion for judgment n.o.v., Whirlpool appealed to this Court.

Whether the 60-day waiting period of 29 U.S.C. § 626 (d) is a jurisdictional prerequisite to the maintenance of a suit under the ADEA has not been addressed by the Supreme Court, nor have we had occasion to consider the question. However, the legislative history of the ADEA provides substantial insight into the nature of the 60-day notice requirement of § 626 (d). The House Report on the original Act clearly indicates in three separate passages that § 626(d) requires conciliation before any legal action may be instituted. In discussing enforcement of the provisions of the ADEA, the Report stresses the integral role of conciliation under the statutory scheme in actions brought by either the Secretary or private individuals, stating

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[4] (Continued)

superior in January of 1978 and the subsequent lawsuit filed in March of 1978. *See Spagnuolo* v. *Whirlpool Corporation*, 641 F.2d 1109 (4 Cir.), *cert. denied*, 454 U.S. 860 (1981). Because we rule that the district court erred in finding that the 60-day notice period may be equitably tolled, we do not reach the question raised by Whirlpool on appeal whether this earlier case was properly entered into evidence and considered by the district court.

[5] The record on appeal discloses that Whirlpool steadfastly refused to engage in conciliation on the grounds that Vance's claim was time-barred and that the pending civil action precluded conciliation. Because we rule that the 60-day requirement of § 626(d) may not be equitably tolled, we do not consider whether Whirlpool's "opportunity" to conciliate, either alone or in conjunction with the other facts surrounding this case, would warrant equitable tolling.

> It is intended that the responsibility for enforcement vested in the Secretary by section 7, *be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense.*

H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218 (emphasis supplied). In further discussing enforcement of the ADEA, the Report states that the legislation

> Directs the Secretary to attempt to secure voluntary compliance through conciliation before instituting action, and *requires* 60 days' notice to the Secretary by persons intending to file civil actions to provide time for informal methods to bring about compliance with the act.

Id., *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218 (emphasis supplied). A few pages later, we read in an analysis of the bill that

> Subsection (d) requires that persons intending to file civil actions under this act *must* give the Secretary of Labor 60 days' notice before doing so. During the 60-day period, the Secretary would seek to eliminate unlawful practices by informal methods of conciliation, conference, and persuasion.

Id. at 9, *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2223 (emphasis supplied). This explicit discussion of the requirement of 60 days' notice stands in sharp contrast to the absence of any mention of the 180-day charge requirement under § 626(d)(1) in the legislative history of the original Act, and indicates that Congress intended conciliation efforts under § 626(d) to be a strict condition precedent to the initiation of any litigation in federal courts.

The legislative history of the 1978 amendments lends further support to this interpretation of § 626(d). The Conference Report explicitly points out that neither the

180-day requirement of § 626(d)(1) nor the conciliation requirement of § 626(b) (regarding actions initiated by the Secretary of Labor) was intended as a jurisdictional prerequisite to maintaining a cause of action under the ADEA. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. at 12-13, *reprinted in* [1978] U.S.Code Cong. & Ad. News 504, 534. However, throughout this discussion of procedural amendments to the Act no reference is made to the 60-day waiting period of § 626(d). It may reasonably be inferred that by this omission Congress intended the 60-day period to remain a jurisdictional prerequisite to the initiation of a private action, as it had indicated in the 1967 legislative history.

Finally, we note that in 1978 when Congress liberalized the requirements of § 626(d) by requiring merely that a "charge" rather than a notice of intent to sue be filed with the Secretary, Congress reiterated the fact that the notice and conciliation requirements of § 626(d) were central to the statutory scheme and stressed that these requirements remained unaltered by the amendment. The Conference Report on this point reads as follows:

> This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess 12, *reprinted in* [1978] U.S.Code Cong. & Ad.News 504, 534. We find this passage to be a clear statement that by the 1978 amendment to § 626(d) Congress intended only to insure that failure to file a formal notice of intent to

sue would not stand as a bar to relief under the ADEA. We find this excerpt to represent an equally clear statement that the 60-day notice requirement was not relaxed in any degree by the 1978 amendments, and that Congress intended to preserve the conciliation requirement as a prerequisite to the initiation of a private action under the ADEA.

We do not agree with Vance that the 60-day period and the 180-day filing period should be treated alike for the two requirements serve separate and distinct purposes. The 180-day charge requirement is more in the nature of a statute of limitations designed to preclude the maintenance of stale claims. *See Zipes* v. *Trans World Airlines, Inc.*, —— U.S. ——, 102 S.Ct. 1127, ——, 71 L.Ed.2d 234, 243 (1982). On the other hand, the 60-day waiting period is an absolute period of abstention by the federal judiciary intended to enhance judicial economy by promoting the exhaustion of administrative remedies through the Department of Labor prior to the institution of a private suit. We elaborated on the function of the 60-day period in *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292 (4 Cir. 1979), where we stated

> The ADEA provides that resort must first be had to administrative remedies before a private suit may be filed. Any individual who wishes to sue under the ADEA must give the Secretary of Labor sixty (60) days notice of intent to sue. Upon receipt of such notice, the Secretary is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d). If such efforts fail, the Secretary may bring an action under the statute. Most significantly, the right to bring a private suit terminates upon commencement of an action by the Secretary. § 626 (c). *Thus, the entire thrust of the ADEA's enforcement provision is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor.*

Id. at 1296 (emphasis supplied). Since we view the two requirements as serving entirely distinct functions, we are unpersuaded by Vance's arguments that the 60 and 180-day requirements should be treated similarly.

Vance also relies upon two other sections of the ADEA to support his contention that the 60-day waiting period of § 626(d) is not a jurisdictional prerequisite to a private cause of action. First, Vance looks to 29 U.S.C. § 633(b), which provides that where an alleged discriminatory action occurs in a state prohibiting age discrimination, the aggrieved employee may not file a cause of action until 60 days after proceedings have been commenced pursuant to state law. In *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), the employee filed a federal, but not a state age discrimination charge. After federal conciliation efforts failed he brought suit in federal court against his former employer. Ruling that the employee's failure to file a state charge did not deprive the district court of jurisdiction, the Supreme Court ordered the district court to hold the federal suit in abeyance until the employee had filed a state charge and the state agency had been given an opportunity to entertain his grievance. *Oscar Mayer*, 441 U.S. at 764, 99 S.Ct. at ——.

Vance derives from *Oscar Mayer* the proposition that if the 60-day waiting period associated with state administrative remedies may be modified, then the same must be true of the 60-day period concerning federal administrative remedies. However, the complainant in *Oscar Mayer* had properly exhausted his federal administrative remedies, and the Supreme Court's decision said nothing to diminish the importance of conciliation to the federal scheme within the ADEA. An aggrieved employee under the ADEA may file state and federal charges simultaneously, and regardless of the presence of state administrative remedies, an employee must observe the federal administrative process in § 626(d) to accord with the goal of administrative exhaustion prior

to resort to the federal judiciary. (*See id.* at 764, 99 S.Ct. at ——.

Vance's second argument that the 60-day period is not a jurisdictional prerequisite to a private cause of action is based upon 29 U.S.C. § 626(b). Section 626(b) requires that the Secretary of Labor attempt to persuade employers through informal conciliation to voluntarily comply with the ADEA before the Secretary institutes a civil suit. Two circuits have held that the conciliation requirement in § 626(b) is not jurisdictional, and that a district court has the equitable discretion to stay a lawsuit pending before it in order to allow the completion of conciliation before the suit continues. *Marshall* v. *Sun Oil Co.*, 605 F.2d 1331, 1337 n.8 (5 Cir. 1979); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 376 (8 Cir. 1974). Vance has suggested that since the conciliation requirement of § 626(b) is not jurisdictional, then neither is the 60-day period of § 626(d). We disagree.

We note initially that the two sections in question differ in form, substance, and purpose. Subsection (b) of § 626 is concerned with enforcement of the provisions of the ADEA by the Secretary of Labor; it empowers the Secretary to pursue compliance through conciliation and, in the event efforts at conciliation fail, to institute legal action. No time limits are imposed upon the Secretary other than the statutes of limitation found in § 626 (e). *See Brennan*, 495 F.2d at 376 (Secretary not held to rigid guidelines in attempting conciliation under § 626(b)). By way of contrast, subsection (d) of § 626 constitutes an express restriction on the right of an individual to bring a private suit under the ADEA, and specific time limitations are imposed upon the individual. Furthermore, the Secretary must be given an opportunity to resolve the matter before any cause of action accrues to the individual. Indeed, even when a timely private suit is initiated under the ADEA, a suit by the Secretary supersedes the private suit. 29 U.S.C. § 626(c). The fact that under § 626(d) the individual's right to

bring a cause of action is subordinate to the Secretary's power to enforce compliance is established by the legislative history. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218. Thus, it is clear that unlike subsection (b), which deals exclusively with the Secretary's enforcement powers under the ADEA, subsection (d) is designed to insure that the primary mechanism of dispute resolution —informal conciliation efforts pursued by the Secretary —is fully utilized before individuals are entitled to relief in the federal courts. *See id., reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218.

Marshall v. *Sun Oil Co., supra,* and *Brennan* v. *Ace Hardware Corp., supra,* cited by Vance in support of his argument differ fundamentally from the case at bar. Unlike the present case, the Secretary of Labor brought the lawsuits in *Marshall* and *Brennan.* Actions initiated by the Secretary before the termination of conciliation would not place undue pressure on the employer to settle the charge, since the threat of a suit by the Secretary pursuant to § 626(b) is a factor present from the beginning of the conciliation negotiations. However, allowing a private suit to be filed prior to the expiration of the 60-day period would introduce into the conciliation process a new factor which would strip the conciliation requirement of its very function in the remedial scheme of the ADEA. No meaningful conciliation efforts could transpire if at any time during the 60-day period the individual could initiate suit in federal court and thereby preempt conciliation. Section 626(d) is specifically designed to insure that conciliation is immune from such private preemption for 60 days.

Moreover, the ruling in *Marshall* that the conciliation requirement of § 626(b) was not jurisdictional in a strict sense was premised on a rationale inapplicable to cases arising under § 626(d). In *Marshall* the Court reasoned that since the Secretary's cause of action bars a private suit by the employee, dismissal of the Secretary's suit

on grounds that it was filed prematurely would unfairly penalize the employee by conditioning his right to relief on "events beyond his control which are not spelled out in the statute." 605 F.2d at 1337 n.8, *quoting Franks* v. *Bowman Transp. Co.*, 495 F.2d 398, 404 (5 Cir. 1974), *rev'd in part on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). Where the employee brings suit himself in violation of the 60-day waiting period, his right to relief is lost due to events entirely under his own control under requirements which are explicitly spelled out in the statute. In our opinion the rationale upon which the *Marshall* court relied in finding the conciliation requirement of § 626(b) to be nonjurisdictional applies only to actions brought by the Secretary, and is inapplicable to cases arising under § 626(d).

We note finally that other circuits which have considered the question have held that the 60-day period of § 626(d) is jurisdictional and that the failure of the employee to comply with this waiting period will result in the dismissal of his private civil action. *Wright*, 628 F.2d at 953 (6 Cir. 1980) (en banc); *Reich* v. *Dow Badische Co.*, 575 F.2d 363, 367-68 (2 Cir. 1978); *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1077 (7 Cir. 1976) *rev'd in part and remanded on other grounds*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). We agree with these circuits that the language of § 626(d) indicates that the 60-day notice period is jurisdictional, *Ewald* v. *Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183, 1187-88 (6 Cir. 1980), and that the 60-day requirement is designed to assure the primacy of conciliation managed by the Department of Labor in the remedial scheme of the ADEA. *See Reich*, 575 F.2d at 368. Accordingly, we hold that the district court erred in equitably modifying this requirement and entertaining Vance's suit.

Our conclusion with respect to the 60-day waiting period requires that the judgment in favor of Vance be vacated and the case remanded to the district court with

instructions to dismiss the complaint. Despite this disposition of the appeal, however, we are of the opinion that Vance may yet comply with the mandate of § 626(d) by pursuing with the EEOC[9] his charge of discriminatory conduct by Whirlpool. Should conciliation efforts by the EEOC prove fruitless, Vance may refile his complaint in the district court. While we recognize that "[s]uspension of proceedings is preferable to dismissal with leave to refile," *Oscar Mayer*, 441 U.S. at 765 n.13, 99 S.Ct. at —— n.13, such a procedure is foreclosed in the present case since the district court was utterly without jurisdiction to entertain Vance's lawsuit. To countenance the prematurity of the proceedings in this case in the district court, including the trial, would require that we ignore the definitive structure of the ADEA and the congressional mandate that resort to administrative remedies shall be a prerequisite to an action in the federal court. Consequently, dismissal of the action with leave to refile is the appropriate remedy under the peculiar facts of this case.

The statute of limitations does not bar the procedure we propose. While the statute is not automatically tolled under § 626(e) for subsection (d) cases as it is for subsection (b) cases, it is clear that the statute of limitations of 29 U.S.C. § 255 (incorporated under § 626(e)) may be equitably modified where circumstances warrant. *See, e.g., Bush* v. *State Industries, Inc.*, 599 F.2d 780 (6 Cir. 1979). In our opinion it is proper in this case to modify the requirements of 29 U.S.C. § 255 to permit Vance to refile in district court should conciliation efforts prove unsuccessful. There has been no demonstration of prejudice to Whirlpool should refiling be permitted, and Vance's simultaneous filing with the Secretary of Labor and the district court, though improper, was not an unreasonable course of action to follow given his dilemma and the dearth of clear precedent regarding his particu-

[9] *See supra* note 3.

lar situation. Vance should not be penalized for his conduct here by loss of his right to bring suit in federal court in the event conciliation attempts are unsuccessful.[1]

Accordingly, the judgment of the district court is vacated and Vance's claim is dismissed with leave to refile his action consistent with this opinion should he be so advised.

JUDGMENT VACATED AND DISMISSED.

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[1] Both parties briefed and argued the question of whether the 180-day filing period of § 626(d)(1) is a jurisdictional prerequisite and could be equitably tolled in this case. However, since we conclude that the 60-day notice period of § 626(d) precluded jurisdiction in the district court, we do not reach the issue of the jurisdictional dimensions of the 180-day requirement or the circumstances under which it might be tolled.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-1568

WILFRED H. VANCE,

Appellee,

versus

WHIRLPOOL CORPORATION,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

Before FIELD, Senior Circuit Judge; WIDENER and SPROUSE, Circuit Judges.

David J. Parsons (Charles J. Griffin, Jr., Seyfarth, Shaw, Fairweather & Geraldson; Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell on brief) for Appellant; Samuel M. Millette, Ernest S. DeLaney, III (DeLaney, Millette, DeArmon and McKnight, P.A. on brief) for Appellee.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

FIELD, Senior Circuit Judge:

In this case under the Age Discrimination in Employment Act of 1967 (ADEA) the defendant, Whirlpool, appealed from a judgment rendered in favor of the plaintiff. Among other arguments advanced by it on appeal, Whirlpool contended that the district court erred in holding that the 180-day filing period of 29 U.S.C. § 626(d)(1) had been equitably tolled, and that the court further had improperly concluded that Whirlpool was equitably estopped from asserting the 60-day conciliation period under 29 U.S.C. § 626(d) as a bar to the plaintiff's action. Concluding that the 60-day conciliation period of section 626 (d) is jurisdictional, we held that the district court erred in equitably modifying this requirement and entertaining the plaintiff's suit, vacated the judgment in favor of Vance, and remanded the case with instructions to dismiss the complaint. *Vance* v. *Whirlpool Corp.*, 707 F.2d 483 (1983). Since we concluded that the 60-day notice requirement precluded jurisdiction in the district court, we declined to reach the issue of the jurisdictional dimensions of the 180-day requirement of the statute or the circumstances under which it might be tolled. 707 F.2d 490, footnote 7.

Counsel for the plaintiff filed a petition for rehearing suggesting, among other things, that it was incumbent upon us to consider and dispose of the issue with respect to the 180-day requirement of the statute. Upon reflection, we agree with counsel that the interests of efficiency and conservation of judicial resources would best be served by our disposition of that issue. To that end we are supplementing the original opinion as follows.

Although no Supreme Court opinion has addressed the question whether the 180-day requirement of 29 U.S.C. § 626(d)(1) of the ADEA is jurisdictional in nature, the Court recently ruled that a similar provision in Title VII of the Civil Rights Act of 1964[1] is not a jurisdictional

[1] 42 U.S.C. §§ 2000e *et seq.*

prerequisite to suit in a district court. *Zipes* v. *Trans World Airlines, Inc.*, —— U.S. ——, 102 S.Ct. 1127, ——, 71 L.Ed.2d 234, 243 (1982). While the procedural requirements of Title VII and the ADEA are not identical, *see Naton* v. *Bank of California*, 649 F.2d 691, 695 n.3 (9 Cir. 1981); *Bean* v. *Crocker National Bank*, 600 F.2d 754, 758-59 (9 Cir. 1979), both statutes contain a 180-day filing provision,[2] and it is clear that the Supreme Court's interpretation of this provision under Title VII provides significant interpretive authority of the like provision in the ADEA. *See Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979); *Coke* v. *General Adjustment Bureau, Inc.*, 640 F.2d 584, 587 (5 Cir. 1981). We find the Supreme Court's ruling in *Zipes* to be highly persuasive authority for interpreting the 180-day requirement of § 626(d)(1) as nonjurisdictional and subject to equitable modification.

We, ourselves, have not yet passed on the question whether the 180-day filing period of the ADEA is jurisdictional in nature or whether it may be equitably tolled, *see Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 309 (4 Cir. 1981), and the legislative history of the original Act provides little guidance on the question. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5-6, 9 *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218, 2223. In the legislative history of the 1978 amendments to the ADEA, however, Congress specifically addressed the is-

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[2] The notice requirement applicable to Title VII is set forth in 42 U.S.C. § 2000e-5(e)(1974), and provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter.
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> * * *

sue of equitable tolling of the 180-day period, stating that:

> The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. *See, e.g., Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), affirmed by an evenly divided court. [434 U.S. 99] 98 S.Ct. 600 [54 L.Ed. 472] (1977); *Bonham* v. *Dresser Industries, Inc.*, 16 FEP Cases 510 (3d Cir. 1977); *Charlier* v. *S. C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977).

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S.Code Cong. & Ad.News 504, 534. Although subsequent legislative observations are not considered a part of the legislative history of an act, *Oscar Mayer*, 441 U.S. at 758, 99 S.Ct. at 2072, it is firmly established that subsequent legislative history is entitled to some weight, particularly where the intent of the enacting Congress is obscure. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596, 100 S.Ct. 800, 814, 63 L.Ed.2d 54 (1980); *Coke*, 640 F.2d at 594 (5 Cir. 1981). The 1978 amendments would indicate that Congress had the opportunity to correct the prevailing view of the courts that the 180-day period was subject to equitable tolling had it desired to do so, and that Congress elected to endorse that view. We believe that this legislative history provides a substantial basis for concluding that equitable modification of the 180-day requirement is permissible where circumstances warrant.

This reading of the statute finds support in the decisions of other circuits which have had occasion to consider the issue since the 1978 amendments to the ADEA. *See, e.g., Nolen*, 649 F.2d at 696 (9 Cir. 1981); *Cole*, 640 F.2d at 595 (5 Cir. 1981); *Wright* v. *State of Tennessee*, 622 F.2d 949, 953 (6 Cir. 1980) (en banc); *Nie-*

sen v. *Western Electric Company, Inc.*, 603 F.2d 741, 743 (8 Cir. 1979); *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287, 1289 (7 Cir. 1978). In light of the Supreme Court's interpretation in *Zipes* together with our reading of the legislative history, we are in substantial agreement with those circuits which have considered the issue and held that the 180-day requirement of 29 U.S.C. § 626(d)(1) may be equitably tolled where circumstances warrant.

The question remains whether the circumstances of this case warrant equitable tolling of the 180-day period. Concededly, Whirlpool violated its statutory duty under the Act by neglecting to post a notice in its Charlotte office informing its employees of their rights under the ADEA. Such a notice is required to be posted in a prominent place on the employer's premises. 29 C.F.R. § 1627.10 (1981). Congress imposed this requirement to insure that covered employees would be informed of their rights, and in the present case Whirlpool's failure to post such a notice prevented Vance from learning of his ADEA rights at the time of his discharge. Under the circumstances the district court was correct in holding that the 180-day period should be tolled by reason of Whirlpool's failure to post the statutory notice. *See Kephart*, 581 F.2d at 1289; *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 193 (3 Cir. 1977), *cert. denied* 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).

Once the 180-day period has been tolled due to the employer's failure to post the statutory notice, it has been held that the period will begin to run from the time that the employee acquires actual knowledge of his rights or retains an attorney. *See Kephart*, 581 F.2d at 1289; *Bonham*, 569 F.2d at 193. In the present case the issue as to when Vance obtained actual knowledge of his rights was disputed. During a visit to an employment agency in October of 1978, Vance observed the statutory notice and learned of his rights under the Act. He thereupon contacted the Department of Labor, but was advised by

an employee of the Department that his charge against Whirlpool was time-barred by reason of the 180-day requirement. In the light of this information, Vance did not attempt to file a charge, and he testified at trial that he first learned that he might have a viable claim in April of 1979 when upon the advice of a friend he consulted an attorney. Whirlpool contends that the notice period began to run in October of 1978 when Vance saw the statutory notice and learned of his rights under the Act. Therefore, Whirlpool argues, Vance's charge in May of 1979 was time-barred. Vance counters that his charge was not barred since the notice period did not start to run until April of 1979 when the attorney advised him that he did, in fact, have a right to bring such a charge against Whirlpool.

Ordinarily, we would agree with Whirlpool that the 180-day period should be tolled only until such time as an employee observes the statutory notice or otherwise learns of his rights under the ADEA. Here, however, the period had already run when Vance saw the notice, and in our opinion he acted reasonably in assuming that his claim was barred, especially in view of the advice which he received from the employee of the Department of Labor. Under these circumstances, we think the district court acted properly in submitting to the jury the question whether Vance filed his charge with the Secretary within 180 days from the time he retained a lawyer or obtained actual knowledge of his rights under the ADEA. Since the jury found in its special verdict that Vance had filed a timely charge, and its finding is supported by substantial evidence in the record, the district court acted properly in holding that the 180-day filing period had been tolled until April of 1979.

Subject to this supplemental opinion, we affirm our previous opinion and mandate vacating the judgment in this case.

WIDENER, Circuit Judge, concurring and dissenting:

While I concur in the original opinion of this panel published at 707 F.2d 483 (4th Cir., May 10, 1983), I must respectfully dissent to its supplemental opinion.

In the original opinion of the panel, we held the district court was without jurisdiction and directed that the action be dismissed. Indeed, this direction of dismissal is repeated in the last paragraph of the supplemental opinion.

I think the proposition too plain for argument that if the district court had no jurisdiction to decide the merits of the case, then its judgment had to be vacated for it was powerless to decide any of the merits, specifically including whether or not the 180-day filing period of 29 U.S.C. § 626(d)(1) had been equitably tolled.

I think it equally plain that if the district court had no jurisdiction to decide that matter, then we have no jurisdiction to decide that or any other matter in the case once we have concluded that the district court was without jurisdiction.

The Supreme Court has addressed this proposition quite clearly in *Ex parte McCardle*, 74 U.S. 264, 7 Wall. 506 (1869). In the *McCardle* case, the Supreme Court's jurisdiction to hear the case being appealed was taken away by Congress during the pendency of the appeal, indeed, after argument thereof. 74 U.S. at 265. The question before the Court was whether or not the Act of Congress passed while the appeal was pending had taken away the Court's jurisdiction to hear the appeal. The Court held that the statute had just that effect and in its discussion said:

> Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." 74 U.S. at 265.

Later in the same opinion, the Court said with respect to pronouncing judgment in the case:

> "It is quite clear, therefore, that this Court cannot proceed to pronounced judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and laws confer." 74 U.S. at 265, 266.

Lest there be any doubt that *McCardle* suffers from an infirmity of age (*Marbury* v. *Madison*, 1 Cranch 137 (1803), certainly does not), the Court has only recently restated the same principle in *Firestone Tire & Rubber Co* v. *Risjord*, 449 U.S. 368 (1980). In *Firestone* the Court decided that an order refusing to disquality an attorney was not an appealable order and reversed the Eighth Circuit which had decided that point to the same effect, but had made its decision prospective only and had reached the merits of the question appealed. It was because the Eighth Circuit "reached the merits of the order appealed from," 449 U.S. at 379, that it was reversed. The Court stated the proposition clearly in part III of its opinion:

> "If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks jurisdiction to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be prospective only. We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without jurisdiction to decide the merits." 449 U.S. at 379.[1]

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[1] We have cited this proposition from *Firestone* with approval in *American Federation, etc.* v. *Federal Labor Board Auth.*, 675 F.2d 612 (4th Cir. 1982).

I suggest that our court is doing in this opinion precisely what the Supreme Court declined to do in *McCardle* and reversed the Eighth Circuit for doing in *Firestone*. We are pronouncing judgment in a case in which there was no jurisdiction in the district court, much less in our own.

Without discussion of the philosophical underpinnings which make obligatory upon Article III courts the rule of *McCardle* and *Firestone*, it will suffice for me to say at this time that I think we exceed our warrant.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1568

Wilfred H. Vance,

Appellee,

versus

Whirlpool Corporation,

Appellant.

ORDER

Upon consideration of appellant's petitions for rehearing and suggestions for rehearing en banc, filed May 24, 1983 and September 12, 1983,

IT appearing to the court that the original petition was granted to the extent the supplemental opinion modified the initial decision of the court. No active judge of the court having requested a poll on either petition, the subsequent petition for rehearing with suggestion for rehearing en banc hereby is denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Field. Judge Widener dissents from the modification of the initial panel decision.

For the Court,

WILLIAM K. SLATE II
CLERK

Filed October 27, 1983

[FILED MAY 29 1981]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. C-C-79-140

WILDRED H. VANCE,

Plaintiff,

vs.

WHIRLPOOL CORPORATION,

Defendant.

ORDER

This is an action under the Age Discrimination in Employment Act, which was tried before this Court and a jury beginning on March 27, 1981 and ending April 2, 1981, when plaintiff received a jury verdict in his favor on all issues.

Defendant earlier moved for summary judgment on the grounds that plaintiff had failed to comply with the notice requirements of 29 U.S.C. §626(d). That section requires a plaintiff to file a charge of age discrimination with the Secretary of Labor within 180 days of the alleged discriminatory act and at least 60 days prior to

filing suit. This Court concluded that the two notice periods provided for in §626(d) of the Act were not jurisdictional, but rather were subject to modification due to equitable considerations, and that genuine issues of fact remained to be determined in order for the Court to decide whether to exercise its equitable jurisdiction to toll the two times periods. Accordingly, defendant's motion for summary judgment was denied.

At the hearing on the motion for summary judgment on April 9, 1980, plaintiff's attorneys moved the Court to stay the action for 60 days in order to allow defendant to engage in conciliation if it so desired. The Court noted that there was no need to stay the action as the case would not be reached for trial for a period far in excess of 60 days, and instead, directed the parties to get together to attempt to conciliate the matter if defendant so desired. Thereafter, the parties engaged in substantial efforts to settle the case, but were unable to reach an accommodation, and accordingly, the matter came on for trial before this Court and a jury on March 27, 1981.

Three factual issues relating to the question of equitable tolling were submitted to the jury and the jury verdict was as follows:

1. Did defendant Whirlpool fail to post and keep posted in conspicuous places upon its premises in Charlotte an age discrimination notice or notices prepared as approved by the Secretary of Labor setting forth information to employees regarding their rights under the Age Discrimination Act?

   ANSWER: Yes

2. Did the plaintiff Wilfred Vance file a charge of age discrimination with the Secretary of Labor within 180 days of retaining a lawyer or obtaining actual knowledge of his rights under the Age Discrimination in Employment Act?

   ANSWER: Yes

3. Did the defendant Whirlpool Corporation refuse to conciliate with the Department of Labor concerning the plaintiff's charge of age discrimination?

   ANSWER: Yes

The Court, based upon the jury verdict, and sitting as a Court of equity independent of the jury, finds the facts hereinafter set forth.

Plaintiff was discharged from his job with defendant on May 3, 1977 and his age was a causative or determining factor in defendant's decision to discharge him. Defendant's discriminatory conduct towards plaintiff was willful and plaintiff's discharge was not effected in good faith. Defendant failed to post and keep posted any posters on its premises in Charlotte setting forth information to employees regarding their rights under the Age Discrimination Act even though it knew of the requirements of the Act that such notice should be conspicuously posted on its premises. In fact, defendant waited more than one year and eight months after the first charge against it alleging age discrimination in its Charlotte office to post the statutorily required notice.

As a result of defendant's failure to post an age discrimination notice, plaintiff was ignorant of his rights under the Age Act and did not become aware of such rights until April of 1979 when he retained his present attorneys. However, at that time, plaintiff and his attorneys were on the horns of a dilemma. The two year statute of limitations for nonwillful violations of the Act set forth in 29 U.S.C. §255(a), and incorporated into the Age Act by 29 U.S.C. §626, would expire on May 2, 1979. Therefore, it was impossible for plaintiff to file his lawsuit within the two year statute of limitations period and still file a charge with the Secretary of Labor 60 days prior to filing the suit. Plaintiff, through no fault of his own, had to choose between satisfying the 60 day notice period of §626(d) or the two year statute of limitations period of §255(a). He chose the latter. Plaintiff sent his charge of age discrimination to the Department of Labor on April 30, 1979, and the charge was received by a representative of the Department of Labor on May 1, 1979. Plaintiff filed his complaint on May 1, 1979.

Notwithstanding the filing of the lawsuit, the Secretary of Labor attempted to conciliate plaintiff's charge of age discrimination. On May 3, Fred Carlock, the Charlotte Area Director of the Department of Labor, wrote defendant informing it of the charge and setting a conference for May 10, 1979. Defendant refused to attend this initial conference and subsequently informed the Department of Labor on June 12, 1979 that it would not engage in any conciliation efforts because plaintiff's charge of age discrimination was outside the two year statute of limitations period. (Defendant contended that even though plaintiff was first notified of his discharge on May 3, 1977, the discharge "related

back" to April 22, 1977). The Court concludes that defendant's asserted reason for refusing to conciliate was illegitimate, and that defendant, in fact, had no intention of conciliating the charge. The Court is cognizant of the fact that defendant had earlier refused to engage in conciliation concerning a charge of age discrimination in its Charlotte office filed on January 3, 1978 by Colombo A. Spagnuolo. A jury and this Court subsequently found that Whirpool had willfully engaged in age discrimination against Spagnuolo.

I conclude that the 180 day and the 60 day notice period as set forth in §626(d) are not jurisdictional, but are in the nature of statutes of limitations and therefore are subject to equitable modification. (See *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977); *Dartt v. Shell Oil Company*, 539 F.2d 1256 (10th Cir. 1976) aff'd by an equally divided court, 434 U.S. 99 (1977); *Nielsen v. Western Electric Company, Inc.*, 603 F.2d 741 (8th Cir. 1979); *Charlier v. S. C. Johnson and Son, Inc.*, 556 F.2d 761 (5th Cir. 1977); *Rucker v. Great Scott Super Markets*, 528 F.2d 393 (6th Cir. 1976); *Bishop v. Jelleff Associates*, 398 F.Supp. 579 (D.D.C. 1974)). In reaching such conclusion, I am mindful that the ADEA is "remedial and humanitarian legislation which should be liberally interpreted to effectuate the Congressional purpose of ending age discrimination in employment." (See *Bonham*, supra, at 193; *Kephart*, supra, at 1288; and *Dartt*, supra, at 1260). This construction of §626 is also endorsed by Congress, as the legislative history of the 1978 Amendments to the Act contains

the following explanation of the charge requirements of §626:

> The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. Legislative History, P.L. 95-256, Joint Explanatory Statement of the Committee of Conference, U.S. Code Cong. and Admin. News 1978, p. 528.

Congress also specifically granted to the District Court the power "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter." 29 U.S.C. §626(b).

Section 627 of the Act provides:

> "Every employer . . . shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Chapter.

Clearly, Congress imposed this requirement on employers to insure that employees within the protected age group would be fully informed of their rights under the Act. It is equally clear that this end would not be met if employers were free to breach the posting requirement without penalty. Accordingly, I conclude that the 180 day notice limitation of §626(b) is tolled by the defendant's failure to post conspicuously on its premises notice of

ADEA rights and that such period began to run in April of 1979 when the plaintiff retained an attorney and acquired actual knowledge of his rights under the Act. (*Kephart*, supra, at 1289; *Dartt*, supra, at 1260; *Bonham*, supra, at 193).

I conclude that plaintiff's failure to wait 60 days after filing a charge with the Secretary of Labor to commence his lawsuit should also be excused. Plaintiff was forced to take such a course by defendant's own acts and omissions in failing to make plaintiff aware of his rights under the Act. Defendant's actions are particularly reprehensible because evidence adduced at the trial of this cause demonstrated that defendant was aware of the provisions of the Age Discrimination Act at the time of plaintiff's discharge. Defendant's cavalier attitude towards its statutory duty is evidenced by the fact that it did not post an age notice in its Charlotte office until one year and eight months after it first received a charge of age discrimination by one of its employees, and more than two years and three months after the plaintiff in this action was discharged.

Defendant suffered no prejudice by plaintiff's inability to give the Secretary 60 days in which to conciliate the action. Defendant was already aware of allegations of age discrimination in its Charlotte office by virtue of Spagnuolo's charge of age discrimination filed with the Secretary of Labor in January of 1978 and his lawsuit filed in this Court in March of 1978. The Secretary of Labor afforded defendant an opportunity to conciliate plaintiff's charge, but defendant refused to do so. This Court also afforded defendant an opportunity to conciliate. Thus, defendant had a full and fair opportunity to

engage in whatever informal methods of conciliation it desired.

This Court is unwilling to penalize the plaintiff by dismissing his lawsuit for failure to strictly adhere to the requirements of §626, when such failure was specifically caused by the willful, illegal acts of defendant. As the Court said in *Skoglund v. Singer Company*, 403 F.Supp. 795 (D.N.H. 1975), when faced with a similar situation:

> This case does not concern a procedural default due to a lay person's lack of knowledge in the intricacies of the law; it is even more basic. Plaintiff's failure to timely file . . . is due to defendant's failure to notify him of his rights as required by law. Defendant should not benefit to plaintiff's detriment by its failure to fulfill the responsibilities laid upon it by Congress. It is basic to our system of justice that one should not benefit from a wrong done to another. 403 F.Supp at 804.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. This Court has jurisdiction of this action;

2. That the 180 day notice period of §626(d) of the Act is equitably tolled until April of 1979;

3. That defendant is equitably estopped from asserting the 60 day time period of §626(d) of the Act due to its own failure to comply with its statutory duty to make plaintiff aware of his rights under the Act; and

4. That there was sufficient compliance by plaintiff with the 60 day notice period of §626(d) to accomplish the statutory purpose of that section because defendant was already aware of allegations of age discrimination in its Charlotte office and defendant was afforded a full and fair opportunity to conciliate plaintiff's charge of age discrimination, both by the Department of Labor and by this Court.

May 28, 1981

/s/ James B. McMillan

James B. McMillan
United States District Court Judge

APPENDIX E

PLAINTIFF'S EXHIBIT NO. 47

NARRATIVE REPORT OF CONCILIATION EFFORT OF U.S. DEPARTMENT OF LABOR (BY FRED E. CARLOCK, AREA DIRECTOR)

COVERAGE

The subject employer is engaged in the wholesale and retail sales and distribution of refrigerators, air conditioners, etc., in the western section of North Carolina. Goods are regularly received from out of state, and the employer is part of a national enterprise with an average in excess of $250,000. All employees are subject to the provisions of the ADEA.

STATUS OF COMPLIANCE

Mr. Wildred H. Vance, age 49, 3900 Chevington Road, Charlotte, N.C. 28211, alleges he was terminated because of his age on 5/1/77.

Suit was filed by the attorney representing Mr. Vance at the same time the charge of age discrimination was filed because the statute of limitations would have run out if suit was not filed.

DISPOSITION

An FTS conference was held with attorney Jeffrey Ross, representing the employer, on 6/12/79. Mr. Ross stated they declined to conciliate, that a motion had been filed with the court to dismiss the case as being outside the two year statute of limitations. The attorney representing the employee was advised on 6/12/79.

Fred E. Carlock, AD
6/12/79